No. 48850-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEONEL GONZALEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Gonzalez's conviction for tampering with a witness violates due process because there is insufficient evidence for a rational trier of fact to find the elements beyond a reasonable doubt.

The State did not present sufficient evidence to prove that Mr. Gonzalez attempted to induce his girlfriend, Ms. Hook, to testify falsely. RCW 9A.72.120(1)(a); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Criminal statutes must be narrowly construed, and when evaluating the sufficiency of the evidence for a witness tampering charge, this Court should "resolve all doubts against including borderline conduct." *State v. Pella*, 25 Wn. App. 795, 797, 612 P.2d 8 (1980).

As the State acknowledges, Mr. Gonzalez's comments to Ms. Hook only involved her possible communication with the defense investigator. Ex. 1A at 5:48; Resp. Br. at 10. Mr. Gonzalez did not discuss Ms. Hook's testimony at trial. The statute requires the State demonstrate the defendant attempted to induce the witness to *testify* falsely. RCW 9A.72.120(1)(a). A request to make a specific statement to the defense's investigator does not satisfy this standard. *See Pella*, 25 Wn. App. at 797.

In addition, the State incorrectly claims Mr. Gonzalez made "an explicit request" to Ms. Hook that she make a false statement to the investigator. Resp. Br. at 10. No such explicit request was made. In fact, the evidence does not show Mr. Gonzalez was asking Ms. Hook to make a *false* statement to anyone. In the recorded phone conversation, Mr. Gonzalez told Ms. Hook to inform the police he had permission to take the vehicle. Ex 1A at 6:48. Ms. Hook responded that would be hard for her to do, saying Mr. Gonzalez already knew "what the deal was." Ex. 1A at 7:42.

At trial, Ms. Hook testified she had allowed Mr. Gonzalez to use her mother's vehicle in the past, despite her mother's wishes to the contrary. RP 231-32. She also explained that she told Mr. Gonzalez it would be "hard" to tell police she had given him permission in this instance because she feared looking stupid, rather than because it was a lie. RP 215. Ultimately, the State was unable to convince the jury to convict Mr. Gonzalez on the theft of the motor vehicle charge, indicating some jurors remained unconvinced that he had taken the vehicle without permission. CP 44. Thus, the evidence did not prove his statements were anything other than a plea for Ms. Hook to tell the truth to the defense investigator.

The evidence did not demonstrate Mr. Gonzalez attempted to induce Ms. Hook to testify falsely. Reversal is required. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. The to-convict instruction erroneously omitted the identity of the controlled substance, requiring reversal of the possession charge.

All essential elements of the crime charged must be included in the to-convict instruction. *State v. Clark-El*, 196 Wn. App. 614, 617, 384 P.3d 627 (2016). In drug cases, the identity of the substance at issue is an essential element of the crime when it increases the statutory maximum sentence the defendant faces if convicted. *Id.*

Mr. Gonzalez was charged with possession of methamphetamine but the jury was instructed it only needed to find Mr. Gonzalez possessed "a" controlled substance in order to find him guilty. CP 32. The State makes the untenable argument that no error occurred in Mr. Gonzalez's case because "the penalty was the same no matter what substance was in the defendant's pocket." Resp. Br. at 15.

The State cites to the drug tables in the Sentencing Reform Act in support of its claim, but ignores the plain language of the possession statute, RCW 69.50.4013. This provision states that an individual who violates RCW 69.50.4013 is guilty of a class C felony *except* as

provided in RCW 69.50.4014, which indicates that individuals found guilty of possessing a certain amount of marijuana have only committed a misdemeanor. Because of the marijuana exception in RCW 69.50.4013, the identity of the controlled substance determines whether possession of the substance was a crime and, if so, the level of the crime and corresponding penalty. *See* RCW 69.50.4014; RCW 69.50.360; Op. Br. at 14 (discussing the fact that possession of very small amounts of marijuana only constitute a civil offense). Contrary to the State's assertion, the identity of the substance changes the possible penalty.

The State also asks this Court to rely on the plurality decision in *State v. Sibert*, 168 Wn.2d 306, 311-12, 230 P.3d 142 (2010), to affirm Mr. Gonzalez's possession conviction. Resp. Br. at 16. However, as this Court recognized in *Clark-El*, "a plurality opinion 'has limited precedential value and is not binding on the courts.'" 196 Wn. App. at 619; *see also* Op. Br. at 15-16. Instead, this Court should adhere to its decision in *Clark-El*, where it concluded simply "that it is error to give a to-convict instruction that does not contain all elements essential to the conviction." 196 Wn. App. at 619. Here an error occurred because

the identity of the substance is an essential element and it was wrongly admitted from the to-convict instruction.

Finally, as explained in Mr. Gonzalez's opening brief, the fact that the to-convict instruction included language indicating the controlled substance was "as charged in Count II," does not save the erroneous instruction, as claimed by the State. Op. Br. at 16-17; Resp. Br. at 16-17. The instruction only requires the jury to find Mr. Gonzalez possessed "a" controlled substance in order to find he possessed the controlled substance "as charged." CP 32; Op. Br. at 16-17. It did not require the jury to find Mr. Gonzalez possessed the controlled substance charged in Count II. CP 32.

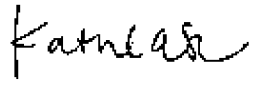
For all of these reasons, this Court should find the omission of the identity of the substance in the to-convict instruction was error. For the reasons expressed in Mr. Gonzalez's opening brief, the omission of an essential element from a to-convict instruction is never harmless and, even it were subject to a harmless error analysis, reversal is required. Op. Br. at 17-25.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Gonzalez's convictions.

DATED this 18th day of April, 2017.

Respectfully submitted,



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STATE OF WASHINGTON, Respondent, v. LEONEL GONZALEZ, Appellant.	)))))))))	NO. 48850-7-II

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